FILE COPY

FILED
JAN 15 1960
JAMES R. BROWNING, Clerk

No. 596

In the Supreme Court of the United States

OCTOBER TERM, 1959

ASHBY O. STEWART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY W. STEWART, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General
CHARLES K. RICE,
Assistant Attorney General
A. F. PRESCOTT,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 596

ASHBY O. STEWART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY W. STEWART, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case concerns the includibility in a decedent wife's estate of certain insurance policies on the life of her husband. It is uncontroverted that these policies, which were purchased with community property funds, were the community property of decedent and her husband. The question is whether one-half of the cash surrender value of these policies is properly includible in the gross estate of the wife under any of the subdivisions of Section 811 of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.). It is apparently the position of the petitioner that, while

536599—60

these policies were community assets, because they were life insurance they somehow took on a unique aspect so that the wife's interest therein was no more than a right of protection should the husband predecease her. Life insurance is accorded the same treatment under the California statutes and cases, however, as is any other asset of the marital community, and under the applicable state law there is no warrant for treating it differently from other community property, the contentions of the taxpayer to the contrary notwithstanding. Section 161a of the Civil Code of California.

This Court has considered another side of this problem in *Lang* v. *Commissioner*, 304 U.S. 264, where it was held that upon the death of a husband, with a wife surviving, only one-half of the proceeds of his life insurance which had been purchased with community funds was includible in his gross estate. It is therefore only logical that upon the wife's prior death the other one-half interest in the policies which she owns should be included in her estate. Indeed, to hold otherwise would open a wide vista for estate tax avoidance since a husband would be able to purchase life insurance upon his life with community assets, secure in the knowledge that under the *Lang* case only one-half of such policies might be included in his estate should he die first; on the other hand, should his wife predecease him her assets would have been depleted for estate tax purposes by the purchase of the insurance but no portion of the insurance would be includible in her gross estate.

Section 811(a) of the Internal Revenue Code of 1939 provides that there shall be included in a decedent's gross estate all property "[t]o the extent of the interest therein of the decedent at the time of his death". At the time of her death, the decedent in this case owned one-half of the cash surrender value of the insurance policies which her husband had taken out on his own life. Under the unequivocal language of the statute, this one-half interest must be included in her gross estate.

The decision of the Superior Court of San Diego County in the *Estate of Meadenhal* (Pet. 31) does not stand in the way. That case holds no more than that under the California inheritance tax laws any interest which the deceased wife might have in such policies did not pass by will or inheritance so as to fall within the purview of the state inheritance tax act.

Even if one assume for the purposes of argument, however, that the husband's action in investing the community assets in insurance on his life had the effect of making a gift on behalf of the wife, half of the insurance would still be includible in her estate. The California cases relating to gifts of community property made by the husband without the written consent of the wife have generally termed such gifts voidable. See, *e.g.*, *Blethen* v. *Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 243 Pac. 431. The position of the taxpayer that the decedent had no more than a right of protection—a right to void the gift—does not help his case. If the interest of the decedent had been no more

than that, her half interest would still be includible in her gross estate, either under the provisions of Section 811(c)(1) or 811(d) of the Code. Section 811(c)(1)(C) includes in gross estate any interest which a decedent has transferred "intended to take effect in possession or enjoyment at or after his death." If decedent be considered to have made a transfer of her interest in the insurance policies, either to her husband or to the contingent beneficiaries, she would have had a right at least until the time of her death to recapture such interest. Any such transfer, therefore, was one which could not take effect until after her death, and the property so transferred must be included in her estate. Similarly, Section 811(d) includes in gross estate any interests transferred where the enjoyment thereof was subject at the date of death to any change through the exercise of a power to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death. If a voidable gift had been made in this case it might have been revoked by decedent up until the time of her death within the meaning of Section 811(d). It would, however, seem more correct to include the policies in the decedent's estate under Section 811(a), as was held by the Court of Appeals. The insurance policies were community property. The wife did nothing to divest herself of her vested undivided interest in such property prior to her death. Her one-half interest was therefore properly held includible in her gross estate.

The decision below is correct and it does not conflict with either state or federal decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
HELEN A. BUCKLEY,
Attorneys.

JANUARY 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960